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In The
Supreme Court of The United States

OCTOBER TERM, 1941

No. 46

PARKER, DEPUTY COMMISSIONER,
ITED STATES EMPLOYEES' COMPEN-
TION COMMISSION, PETITIONER

vs.

OR BOAT SALES, INCORPORATED

IT OF CERTIORARI TO THE UNITED
ES CIRCUIT COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT

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In The
Supreme Court of The United States

OCTOBER TERM, 1941

No. 46

E. V. PARKER, DEPUTY COMMISSIONER, UNITED STATES EMPLOYEES' COMPENSATION COMMISSION, PETITIONER

vs.

MOTOR BOAT SALES, INCORPORATED

I.

STATEMENT OF THE CASE

The above captioned suit was instituted by Motor Boat Sales, Incorporated, under Chapter 590, Section 21(b), 44 U. S. Statutes (Longshoremen's and Harbor Workers' Compensation Act, Title 33 U. S.

C. A., section 921-b), entitled "AN ACT TO PROVIDE COMPENSATION FOR DISABILITY OR DEATH RESULTING FROM INJURY TO EMPLOYEES IN CERTAIN MARITIME EMPLOYMENTS, AND FOR OTHER PURPOSES," to review, set aside and enjoin an award of compensation made in favor of the "claimant," Jessie B. Armistead, widow of George P. Armistead, Jr., an alleged employee, and her three minor children (one of whom was born before and one four months after their marriage), against E. V. Parker, Deputy Commissioner for the Fifth Compensation Commission (R. 1-6). The United States District Court for the Eastern District of Virginia affirmed the award (R. 58-59).

DECISION OF CIRCUIT COURT OF APPEALS

On appeal the United States Circuit Court of Appeals for the Fourth Circuit in an opinion by Dobie, Circuit Court Judge, reversed the judgment of the District Court and remanded the cause with directions to enter judgment in favor of respondent (Op. R. 69-78; 116 Fed. (2d) 789).

QUESTIONS PRESENTED

The United States Circuit Court of Appeals held that George P. Armistead, Jr., the decedent was employed as a janitor (R. 29-31; 34-35, 39; and the Deputy Commissioner so found R. 7), with certain prescribed duties, and with instructions not to get on a boat or to perform any services on navigable waters or rivers; that his work was local and not concerned with commerce and navigation; that under the Long-

shoremen's and Harbor Workers' Compensation Act, providing that compensation shall be payable only if recovery may not validly be provided by State law; that an injury received in an employment although maritime, pertaining to local matters and having only an incidental relation to navigation and commerce, is subject to application of local Compensation Act and is without the scope of the federal act (116 Fed. 791-792); that Armistead was not employed in maritime employment and had not been ordered, directed or required to get in or work upon boats upon navigable waters, and that no one had ordered or required him to get in the boat at the time of his drowning (792); that he had not been employed in maritime employment and was not within the coverage or ambit of the Longshoremen's and Harbor Workers' Compensation Act (793); that compensation for his injury and death might have been validly provided by State law; that the Deputy Commissioner was without jurisdiction to make the award, and that it was not in accordance with law, and was without substantial evidence to support it (795-796).

STATEMENT OF FACTS

A full statement of the pertinent facts as to decedent's employment, his duties, instructions and orders is here made:

The Motor Boat Sales, Inc., owned and operated a retail store at 3 West Grace Street in the City of Richmond, Virginia, and was engaged in merchandising—selling at its store, among other things, outboard motors, small boats and maritime supplies to cover the boats it handled (R. 21-23).

It did not service or do installation and repair work on boats or motors on boats on navigable waters, the boats it sold to its customers being complete, well equipped and ready to go when sold and delivered. Its employees were not employed to work on navigable waters, and had "no business getting on other people's boats." R. 23.)

George W. Todd, a witness for the claimant (R. 20), testified.

R. 23:

"By the Deputy Commissioner:

Q. You said the Company engaged in dealing in maritime supplies of all kinds ?

A. Yes, sir; to cover the boats we handle.

Q. **That means that you serviced boats?**

A. What do you mean "serviced boats?"

Q. Any kind of equipment they wanted to put on the boat, would you supply it?

A. **No, sir**; we didn't make a specialty of it. I don't know of any instance where we did installation work.

Q. You sell the boats?

A. The boats we sell are ready to go.

Q. **Did you do any repair work after that?**

A. **No, sir; that was for the boat yards.**

Q. How often would your employees go aboard any boat; every day?

A. No, sir; not every day. It was just a rarity that we got on boats. **We haven't got any business getting on other people's boats.**

Id. R. 24-25.

By the Deputy Commissioner:

Q. Mr. Todd, you said you serviced your own boats?

A. If we trade a boat, which we do, and it is brought in by the customer on a trailer, and if anything is needed to be done to it; like painting, we do it.

Q. Did you do any work on the water?

A. No, sir; we are not equipped for it.

Q. Did you repair engines of boats?

A. No, sir; we don't have any equipment for that.

Q. Any boat while in the water, if the ignition went bad, would you send a man?

A. Yes, sir; we have done it. **The man would not go out in the water.**

Welford Earl Lloyd, another witness for the claimant (27 at 28), testified.

By Mr. Parrish, Counsel for claimant:

"Q. You were working there when George Armistead was drowned?

A. Yes, sir.

. . . . . .

Q. You knew George, of course?

A. Yes, sir.

Q. What did he do around there?

A. The first thing he did was clean up the place. Sometime it would take a half day to a day, and he was in the shop cleaning up motors, buffing tanks, and making deliveries.

Q. General handy man?
A. Yes, sir.

. . . . . .

Q. You were in the shop the day he went down the river and was drowned?
A. Yes, sir.
Q. I will ask you if he wasn't sent down by his employer to assist in lifting two motors?
A. Yes, sir."

Randolph Hobbs, called by defendant, testified. R. 34.

"Q. Were you employed by the Motor Boat Sales, Inc., on August 8, 1938, when it was said that George P. Armistead, Jr., got drowned?
A. Yes, sir.

. . . . . .

Q. Was George Armistead employed there at that time?
A. Yes, sir.

. . . . . .

Q. What was George employed as; what was he employed to do up there?
A. George was employed as a porter (35).

. . . . . .

R. 35.
Q. You were there the day that George went down to the James River?
A. Yes, sir.

. . . . . .

R. 36.
Q. What occurred?

A. To the best of my knowledge——

Mr. Parrish. That is vague and indefinite. We want the facts.

The Deputy Commissioner. Whether you remember it?

A. (Continuing) These two gentlemen came by the store with their boat.

Q. What were their names?

A. Mr. Crown and his brother and we had these two motors at the store and it was agreed to let those two motors go down the river. Mr. Lloyd and I talked with Mr. Crown and we decided to let the motors go down the river to be operated on the back of Mr. Crown's boat. George Armistead, at the time, was instructed to go along to help lift these motors from the car to the boat—each of these motors weighed a little better than seventy-five pounds apiece —and to help load them in the car when they got through.

Q. Do what?

A. Load them back in the car when through.

Q. Help load and unload them?

A. Yes, sir.

Q. Did he have any directions to get in the boat to go in the river to do anything?

Mr. Parrish. I object, unless it is shown that this witness instructed George Armistead.

By the Deputy Commissioner:

Q. Did he have authority to give him instructions any other time during his employment?

A. Yes, sir.

Q. You were his immediate superior?

A. Mr. Todd and I and he worked for Mr. Lloyd.

Q. All three of you?

A. Yes, sir. If Mr. Lloyd wanted a motor carried anywhere or if anybody wanted a hand, George helped.

R. 37.

Q. You can state whether he was going down to the river and what he was going for?

A. He was not instructed to enter the boat.

Q. At any time?

A. No, sir.

R. 38.

Q. You didn't tell him what to do that day?

A. Not particularly that day but George was instructed not to get on boats and he was particularly instructed about that, . . .

Q. He would have to get in the boat if his job was to lift it in the boat?

A. Not particularly. The stern was pulled on the shore and the motor was attached to it.

By Mr. Fulton:

Q. You said he was given specific instructions. Did he have any authority or instructions to ride on boats, perform any duties on navigable rivers, or any other kind of rivers?

A. No, sir.

By the Deputy Commissioner:

Q. Did he ever for the benefit of the Company, with your knowledge, act as a watchman for any boats over night?

A. He acted as watchman on a 35-foot craft we sold Mr. Warner Moore and he was paid by Mr. Moore. He was not there at our request, and George stayed in the store and finished his work and was back the next morning.

Q. He wasn't your employee and the other man paid him and directed him what to do?

A. Yes, sir.

By Mr. Fulton:

Q. He never stayed on any boats for you?

A. No, sir.

By the Deputy Commissioner:

Q. You never sent him out on any mission of that kind?

A. To stay on a boat or run it?

Q. Yes, sir?

A. No, sir.

By Mr. Parrish:

. . . . . .

Q. Mr. Hobbs, do you know who told him to go down the river on this occasion?

R. 39.

A. I can't definitely say that I do. I think Mr. Lloyd can.

Q. Generally the purpose was for him to assist in helping to take the motors and putting them in the car from the shop and out of the car on the boat and back of the boat in the car and back to the shop?

A. Yes, sir.

Q. It usually took two men?

A. Yes, sir.

Q. You weren't going to put both motors on at the same time?

A. No, sir.

Q. You were just testing them at the same time?

A. Yes, sir.

By the Deputy Commissioner:

. . . . . .

Q. Didn't George go on other occasions to take a motor and bring it back; how often?

A. No, sir; George was not there in the capacity of a delivery boy. He would put motors in the car and deliver them to different parts of town. I can't recall another instance where George was sent to the river.

W. Earl Lloyd, recalled for defendant (R. 39).

R. 40.

Q. What did you tell George Armistead to do?

A. He was instructed to get the equipment ready for any trip I was going on. George was instructed to help Johnny take it off the trailer and help put it on the boat but he was not instructed to ride on the boat.

Q. That was the instructions?

A. Yes, sir.

Q. And he left the store under those instructions? Had he authority or direction from you while there to go out on the river riding in a boat that was operated in deep water?

A. Not any kind of water. The majority

of times he would leave the store he delivered a motor around town that had been repaired.

By the Deputy Commissioner:

Q. He was instructed to help get the motor out of the trailer to the boat and when through, reverse the procedure?

A. Yes, sir.

. . . . . .

R. 41.

Q. Was that as far as your instructions went; to take the equipment down and after it was tried out bring it back?

A. Yes, sir.

William Crown, another witness for defendant,

. . . . . .

R. 41-42:

Q. Was George Armistead told by you or by Johnny Cooper, the boy that went from the Motor Boat Sales down, to get in your boat and ride, or was he ordered or directed not to?

A. Yes, sir.

Q. Did he have any work to do on the boat?

A. None at all.

Q. You were present when he was told to go down with these motors?

A. Yes, sir.

Q. And you were present when they got down there?

A. Yes, sir.

Q. And you never heard any one tell George to get in the boat and ride?

A. No, sir.

Q. Was it your boat that capsized in the river when George was drowned?

A. Yes, sir.

R. 43.

Q. Were you there when they got there with the motors?

A. I don't know.

Q. But it was approximately the same time?

A. I might have been there first.

Q. Whichever got there first would have to wait?

A. Yes, sir.

Q. And Johnny and George put the motors on?

A. Yes, sir.

. . . . . .

Q. You put the motor on the end?

A. Yes, sir. George had hold of the propeller and Johnny had hold of the motor inside the boat. He had to clamp it on.

Q. And the outside of the boat was standing on land?

A. Yes, sir.

R. 44.

Q. Was George in the boat?

A. He was helping us.

Q. Did he hop in?

A. He got in.

. . . . . .

John Samuel Cooper (R. 44), another witness called by defendant testified:

R. 45.

Q. On that day, August 8th, that Mr. Crown came by, what was George Armistead. the colored boy that was later drowned, what was he going with you down to the river for?

A. To help me.

Q. Do what?

A. Take the motor off the trailer and put it on the boat and take it off when finished.

Q. Did he have any duties in running a motor on out in the water?

A. Not to my knowledge.

Q. Did you instruct him to get in the boat or did he go of his own accord, for a pleasure ride?

A. He went of his own accord.

Q. You were up there when you were told to take the motor down and he went along to help unload the motor from the trailer and attach them to the boat and take them and put them back in the trailer?

A. Yes, sir.

Q. And they were his sole duties?

A. Yes, sir.

Q. And you heard what was said to him?

A. Yes, sir.

Q. You never gave him any and you never heard anybody give him any direction to go on the water?

A. Not to my knowledge.

R. 46.

Q. When these motors were taken off the trailer and each one was attached to the boat, where was the end of the boat?

A. Sitting on the shore, like Mr. Crown said.

Q. Was that true when you took the Johnson motor off the boat and put the other motor on, that the boat was pulled up on the shore and one motor was taken off and the other motor was put on?

A. Just that end was out of the water. The whole boat was not out of the water, just the back end.

. . . . . .

By Mr. Parrish:

Q. You didn't tell George not to get in that boat on either occasion?

A. No, sir.

Q. He had no instructions to operate the boat on the river?

A. No, sir.

R. 47.

. . . . . .

By the Deputy Commissioner:

Q. What was the purpose of the second trip?

A. To try the motor out and see how it operated.

Q. You could handle it all right either by yourself or with somebody else?

A. Yes, sir.

Q. He didn't do anything to assist you?

A. No, sir. He did sit in the front and keep a lookout.

Q. What was the purpose of that?

A. The water was muddy and to see if he saw anything.

Q. Was that necessary or helpful to you?

A. It was helpful.

By Mr. Fulton:

Q. Did you give any orders to sit in front?

A. No, sir.

Q. There was a seat up front and he was sitting there?

A. Yes, sir.

R. 48.

. . . . . .

Q. Did you hook your two batteries up?

A. I believe we did hook them up.

Q. Was it necessary for George to hook them up?

A. I did it myself.

R. 49.

By the Deputy Commissioner:

Q. How often did you go down to work on boats?

A. Not very often. This was the first time I had been down for some time.

Q. Did you go on other trips?

A. No, sir; I had a boat of my own.

Q. Did you go for the Company on similar jobs, to put a motor on a boat or to test it out.

A. Not that I remember.

Q. This was the only time?

A. Yes, sir.

S. King Fulton, another witness for defendant, testified:

. . . . . .

R. 49.

Q. Did you hire this boy, George P. Armistead, Jr., who got drowned on August 8, 1938?

A. I did.

. . . . . .

Q. What were his duties?

A. He was a porter. We had a porter that lived on the premises, but when George took the job he was married and he did not live on the premises. He was a porter and operated under my supervision, and in December, 1937, at which time I went to Washington——

Q. Were his duties ever changed? You were backwards and forwards?

A. No, sir.

Q. What instructions did you give him and other employees generally when they delivered things about going in other people's boats?

A. George was cautioned never to get into a boat and to have nothing to do with a boat or a motor, as explained by Mr. Hobbs (R. ?). The class of boat we sell our customers does not demand a sale technique. I had very rigid rules in regard to handling boats. Prior to November, 1937, I laid down the law very rigidly in regard to that. I think everybody in the store knew my ruling.

R. 50.

Q. What was your ruling; not to go out in rivers or boats for anybody?

A. Yes, sir.

R. 51.

. . . . . .

By the Deputy Commissioner:

Q. Did this man have occasion under your direction to act as watchman?

A. I was here when that specific case came up that they mentioned. I took Mr. Warner Moore and carried him to the Chris-Craft factory and he saw the boats in action and bought one, and I can state definitely that I did not allow him to go on board the boat. George was a fine colored boy.

By Mr. Fulton:

Q. Was he employed to work on a boat?

A. No, sir.

Q. It has been in evidence that he acted as a night watchman.

A. Mr. Warner Moore engaged him.

Q. Who employed him to act as a night watchman?

A. Mr. Warner Moore, Jr. He employed him.

DECEDENT'S DUTIES

When Armistead was employed as janitor and his wages fixed according to his employment, his work and duties were specifically defined:

R. 29.

By Mr. Fulton:

"Q. Mr. Lloyd, you were the mechanic

up there to do the mechanical work on the motors?

A. Yes, sir.

Q. Was George Armistead, the colored boy referred to here, was he a mechanic?

A. No, sir, he wasn't a mechanic.

Q. The work he did on the motor was cleaning up?

A. After it was pulled down.

Q. To clean up the parts and wash them off?

A. Yes, sir; and dry them. I would take them and put them up and he would buff the tank—shine the tank—so it would look nice.

Q. And that was the only kind of work he did on the motor?

A. Except clean. . . .

Q. His duties up there in the store were cleaning up the store and opening up the store in the morning, washing windows, cleaning motors and driving automobiles for making deliveries over town?

A. He had a schedule to go by."

See schedule, defendant's Exhibit No. 1, R. 30-31; also George P. Armistead, Jr.'s, "Social Security Card" signed by him (R. 35), where he stated over his signature that his position was "Porter; rate of pay per week $10.00."

The above is all the evidence as to George P. Armistead, Jr.'s, contract of employment, his work and the orders and directions given him, and it, as well as his own admission in writing in his Social Security Card, show that he was employed solely as

a janitor or porter; that his work and duties were specifically defined; and that he was specifically instructed not to go upon or do any work on navigable rivers or any other kind of rivers, and that he was never employed "in maritime employment in whole or part."

THE UNITED STATES CIRCUIT COURT OF APPEALS REVERSED THE DECISION OF THE DISTRICT COURT

The United States Circuit Court of Appeals for the Fourth Circuit carefully reviewed all the evidence and, in an opinion handed down by Dobie, Circuit Judge, unanimously reversed the decision of the District Court (R. 59-79), and, inter alia, said (R. 71; 116 Fed. (2d) 791):

> "Some questions of administrative procedure under the Act are involved in this appeal. We shall confine ourselves, however, to the discussion of the single question of whether or not Armistead's employment brought him within the ambit of the Act. As to that inquiry, we think that the answer must be in the negative and that, in the light of this answer, the judgment of the District Court must be reversed.'
>
> . . . . . .

Id. R. 72; 116 Fed. (2d) 792:

> "Was Armistead engaged in maritime employment at the time of his death so that a recovery may be had under the Act? Or was

his employment 'not so directly connected with navigation and commerce that to permit the rights of the parties to be controlled by the local law would interfere with the essential uniformity of the general maritime law'? **Alaska Packers Assn.** vs. **Industrial Accident Comm.**, *276* U. S. 467, 469, 48 S. Ct. 346, 72 L. Ed. 656.

"We are forced to the conclusion that Armistead's employment at the time of his death was strictly local and thus **was without the scope of the Act.** Though it is by no means conclusive, we think the title of the Act (Longshoremen's and Harbor Workers' Act) is very informative on our problem. Here is a janitor in a city store, who has been forbidden to go out on boats in navigable waters. To call him a harbor worker or a longshoreman would seem to be a misnomer. When he was sent by his employer on the day of his death to the shore of the James River, this, as far as the record discloses, was the only instance when his duties ever brought him into contact with navigable waters."

Id. R. 77; 116 Fed. (2d) 793):

"(5) It should be noted here that compensation is payable under the Act if, for the injury or death, a recovery 'may not validly be provided by State law.' Act, Section 3(a). It is not necessary for the exclusion of the operation of the federal Act that a recovery should be actually available under a state compensa-

tion act. This is clearly brought out by the opinion of Circuit Judge Soper in **United States Casualty Co.** v. **Taylor,** 4 Cir., 64 F. 2d 521, certiorari denied, 290 U. S. 639, 54 S. Ct. 56, 78 L. Ed. 555."

Id. R. . . . . ; 116 Fed. (2d) 795:

"(6, 7) In **South Chicago Coal & Dock Co.** v. **Bassett,** 309 U. S. 251, 260, 60 S. Ct. 544, 549, 84 L. Ed. 732, the Supreme Court took care to point out that the Act was applicable to employees whose service was that of a sort performed by longshoremen and harbor workers. And in **Sultan Ry & Timber Co.** v. **Department of Labor,** 277 U. S. 135, 48 S. Ct. 505, 72 L. Ed. 820, it was stated that the Act was not applicable even if the employee's work had some admiralty feature, provided this work had only incidental relation to navigation, so that the rights and duties of employer and employee could properly be regulated by local or state law, without working material prejudice to the characteristic features of the general maritime law.

"Armistead's case, we think, differs from the cases discussed above by virtue of the fact that in all of these cases the task assigned, and the instructions given to the employee, necessarily involved the presence of the employee on navigable waters. Armistead, however, was a janitor and he had been expressly cautioned by his employers never to go on boats in navigable waters. Any authorization for Armistead's

> going on the ill-fated boat-trip in question, which may be binding upon his employer, can be predicated only upon the theory that Cooper, the mechanic's helper, was a supervisory employee as to Armistead, and that Cooper's negative acquiescence to Armistead's presence in the boat on this trip might bring the making of this trip within the scope of Armistead's employment. Even should this theory be applicable here, we still believe that any admiralty feature of Armistead's employment falls well within the local doctrine, as that doctrine has been expounded and applied by the courts in connection with the Longshoremen's and Harbor Workers' Act. Armistead was not a mechanic; he had no expert knowledge of outboard motors. This record is devoid of any evidence which might show that, when Armistead was sent upon the errand on the day of his death, the officers of the Boat Corporation ever contemplated that he would go out upon the river in the boat owned by the brothers Crown."

PETITION FOR WRIT OF CERTIORARI

was filed by the Solicitor General of the United States by and in the name of and on behalf of E. V. Parker, Deputy Commissioner, United States Employees' Compensation Commission.—It was not filed by or in the name of Jessie B. Armistead, widow, the claimant, or the guardian ad litem of her three minor children who were made parties to the suit (R.....), nor by the "legal representative" of George P. Armistead.

Jr., the decedent,—as the Act, Section 5 of the Longshoremen's and Harbor Workers' Compensation Act, requires,—no "legal representative" of George P. Armistead, Jr., having ever been appointed.

"The Circuit Court of Appeals for the Fourth Circuit erred:

1. In undertaking to determine independently of the Deputy Commissioner's findings whether at the time of his death decedent was engaged in maritime employment.

2. In failing to hold that the findings of the Deputy Commissioner that decedent was engaged, at the time of his death, in maritime employment, were supported by substantial evidence and, therefore, conclusive.

3. In holding that decedent's employment, at the time of his death, was rather local than maritime, and that a state compensation could validly provide recovery for his death.

4. In failing to hold that the finding of the Deputy Commissioner that decedent's death arose out of and in the course of his employment was supported by substantial evidence and, therefore, conclusive.

5. In holding that decedent's death did not arise out of and in the course of his employment."

ARGUMENT

I.

WANT OF JURISDICTION

It is urged that the reasons stated in the Petition

for granting the writ (6-11) and in the specification of error (pages 7-8) are untenable.

FIRST. (a) All the evidence showed that George P. Armistead, Jr., for whose death compensation was claimed, was not employed "in maritime employment in whole or part" and was not ordered or required to go upon or do any work on navigable waters, and that he was not an employee within the coverage of the Longshoremen's and Harbor Workers' Compensation Act, and that the Deputy Commissioner was without jurisdiction to entertain the claim or make the award; and

(b) That his death did not arise out of and in the course of his employment or in the performance of any work he had been employed, ordered or required to do (R. 23, 34, 36, 37, 38, 40, 41, 42, 45, 47, 49, 51). To the contrary, it was established that he was not an employee in maritime employment or ordered or required to go upon or do any work on navigable waters, and that he was drowned on the James River while taking a ride "of his own accord" (R. 45), and as the result of his violating his contract of employment and disobeying his instructions not to go or work on navigable waters, and that he was at a place when drowned where he had not been employed, ordered or required to go or be; and

(c) The departure of George P. Armistead, Jr., from his work and his getting into the boat and riding upon the James River were matters personal to him, and not concerned with commerce and navigation.

It was this departure from his employment and his work that created the danger and peril which caused his drowning.

This was decided by the U. S. Ct. of Appeals of the District of Columbia, in **Hartford Accident and Indemnity Co. v. Cardillo, et als,** (No. 7490), 112 Fed. 2d, No. 1 (July 8, 1940, page 11.)

There the claimant, while employed as helper in employer's produce warehouse and engaged in loading vegetables on to the employer's truck, sustained personal injury by a co-worker assaulting him. The deputy commissioner found that "the injury had its origin in the employment and that it arose out of and in the course of said employment."

The plaintiff there contested this finding of the District Court of Appeals on the ground, that the injury was caused by a personal quarrel between two employees which had **no relation to** their work, and therefore that the injury was not compensable.

The Court of Appeals held: (op. 13 pars. 3-5)

> **"That an employee's employment required work had to require him to be at the place of danger and exposes him to the risk or hazard, and that if an injury results therefrom, then the injury 'arises out of and in the course of the employment,' citing Fidelity and Casualty Co. of N. Y. v. Burris, (1932), 61 App. D. C. 228 at 230, 59 Fed. 1042 at 1044."**

. . . . . .

The Court of Appeals, then referring to "the earlier rule requiring special risks, since abandoned," said:

> **"It is now held by the greater weight of authorities that, if an employee in the course of his employment has to pass along the public**

streets and thereby sustains an accident by reason of the risk incident to the street, the accident 'arises out of' as well as 'in the course of his employment'." (There he was employed to work in the street.) The Court continuing said (page 14):

"In other words, work increases the employee's exposure to the risks of the street whenever it requires his presence upon it, whether they are common to him or other users or peculiar to him alone. The street merely replaces the factory as the working environment. It is not the peculiar nature of the environment or the risk, provided it is accidental, but the fact that the work brings the worker within the orbit of whatever danger the environment affords that is important."

"(6) In **Hartford Accident and Indemnity v. Hoague**, 1936, 66 App. D. C. 160, 85 F. 2d 418, these principles were extended to an unexplained attack of a stranger taking place on the employer's premises. . . . It is true that claimant's injury was inflicted by a drunken or crazed stranger and was not such a danger as would ordinarily be apprehended by either the employer or the employee. Nevertheless, it was suffered by the claimant when at his place of duty, when upon the industrial premises of his employer, and while he was engaged at the work for which he was employed." (Citing cases.)

"The opinion relied specifically upon the New Amsterdam decision, it ruling that no more is necessary than that the work subjects

the employee to a peril which comes from the fact that he is required to be in the place where it strikes when it does so."

. . . . . .

"(7) No common denominator for the cases can be found in the nature of the specific act or event which is the immediate cause of the injury. . . . the common element is to be found in a broader and more fundamental principle. It is stated by Cordozo, J., in **Leonbruno** v. **Champlain Silk Mills** (1920), 229 N. Y. 470, 128 N. E. 711, 13 A. L. R. 522, as follows:

> "'The claimant was injured not merely while he was in a factory, but because he was in a factory in touch with associations and conditions inseparable from factory life.' "'NOT THE PARTICULAR OR PECULIAR CHARACTER OF THE ASSOCIATIONS AND CONDITIONS, BUT THAT THE WORK CREATES AND SURROUNDS THE EMPLOYEE WITH THEM IS THE BASIC THING'." (Caps ours.)

The Court then said:

> "Not that the act is in the line of duty, or forwards the work, or creates special risks, **but that the work brings the employee within its peril makes it, for** purposes of compensation, 'part of the work'."

The Court, on page 16 of its opinion, further said:

> "It is sufficient **that the work brings the claimant within the range of peril by requiring his presence there when it strikes."**

All the evidence in the instant case shows that George P. Armistead, Jr., was not an employee in maritime employment, and that he had no work to perform on boats or navigable waters, and that neither his employment nor the work he was directed to do required him to be on the boat or Old Man River or within the range or orbit of his peril—did not require his presence on the river at the place he was drowned.

It did not place him at the point of danger or surround him with the danger, or place him in the presence of the act or peril which was the cause of his drowning. **The "basic" thing required of the claimant under the Act was to establish by "substantial" evidence that Armistead's contract of employment, job or work required him to be present on the boat and at the place where he was drowned when the boat capsized, that is, made the danger a part of his contract of employment or orders when the boat capsized. The claimant failed to offer any such evidence.**

Under the Longshoremen's and Harbor Workers' Compensation Act **it is not sufficient to sustain the claim unless the contract of employment of the injured employee or the work he was ordered to do required his presence on the boat of Mr. Crown and on the river, or at the place and time the danger struck.** Perils arising from a departure from his contract of

employment and disobedience of his instructions are independent causes, and do **not** "arise out of and in the course of employment," but are causes outside the employee's employment or job hazard.

The risk of George P. Armistead, Jr.'s going upon and taking a boat ride "of his own accord" **was no part of his employment or work.** When he was drowned he was not engaged in doing any work he had been employed, ordered or required to do. He was a **non-maritime employee—not employed, ordered or required to work or be on navigable rivers.**

Second. The Longshoremen's and Harbor Workers' Compensation Act has fundamental limitations:

> (a) It deals **exclusively** with compensation and applies **only** when the accidental injury or death of an employee is **"in maritime"** and "arises out of and in the course of his employment, in whole or part, "while such employee is engaged in performing the work he was employed' and required to do upon navigable waters of the United States, **"if recovery through workmen's compensation proceedings may not be validly provided by State law."**
>
> (b) The Act deals with the **job** hazards of longshoremen and harbor workers employed in maritime and only provides compensation for disability and death **of such class of employees.** It **does not provide compensation** for disability or death resulting from an injury to **non-maritime employees upon navigable waters.**

This is shown (a) by the Committee on the Judiciary of the Senate of the United States, reporting upon

the bill (Senate Report No. 973, 69th Congress, 1st sess., p. 16), now Longshoremen's and Harbor Workers' Compensation Act, where it said:

> "If **longshoremen** could avail themselves of the benefit of state compensation laws, there would be no occasion for this legislation, but, unfortunately, they are excluded from these laws **by reason of the character of their employment**; and they are not only excluded, but **the Supreme Court** has more than once **held that Federal legislation cannot, constitutionally, be enacted that** will apply state laws to this occupation. **Southern P. Co.** v. **Jansen,** 244 U. S. 205, 61 L. Ed. 1086, L. R. A. 1918 C, 451, 37 S. Ct. 524, Annotated Cases 1917 E, 900, 14 N. C. C. A. 597; **Knickerbocker Ice Co.** v. **Stewart,** 253 U. S. 149, 64 L. Ed. 834, 11 A.L.R. 1145, 40 S. Ct. 438, 20 N.C.C.C.A. 635; **Washington** v. **W. C. Dawson & Co.,** 264 U. S. 219, 68 L. Ed. 646, 44 S. Ct. 302, 24 N.C.C.C.A. 253."

The House Committee, in its report (House Rep. No. 1767, 69th Cong. 2d sess., page 20), said:

> "The principle of workmen's compensation has become so firmly **established that simple justice would seem to require that this class of maritime workers should be included in this legislation."**
>
> . . . . . .
>
> "The bill as amended, therefore, will enable Congress to discharge its obligation to **maritime workers** placed under their jurisdic-

> tion by the Constitution of the United States **by providing for them a law** whereby they may receive the benefit of workmen's compensation." . . .

Except as to the District of Columbia, the Longshoremen's and Harbor Workers' Compensation Act provides **no coverage** for work both afloat and ashore in "an amphibious job." It does not apply to **non-maritime employment upon navigable waters,** since injuries occurring in the later status, no doubt "may validly be compensated under a state law."

The Act thus created recognized what the court decisions and to law writers call "The local exception." It only provides compensation where the relation of the employer-employee exists **in maritime employment.** For these classes of maritime employees it provides compensation and **in this sphere is responsive to the concept** of **maritime unity and is limited to the designated class of persons to whom compensation may be awarded by a commissioner.** It **only** conferred jurisdiction upon him as to questions of fact, arising with respect to injuries of employees "within the purview of the Act" and then **only** when the claim is supported by evidence showing it to be within the scope of his authority. An award to an injured **non-maritime employee,** or whose injury did not "arise out of and in the course of his employment," or whose compensation may be provided by state law, even though his injury should occur upon navigable waters, "is not in accordance with law."

Hence the Longshoremen's and Harbor Workers' Compensation Act **does not apply to the non-maritime**

employment of George P. Armistead, Jr., and to his injury at a place where he was not employed or required to be, even though his injury occurred upon navigable water. His employment and work were **non-maritime,** did not require him to be where he was, and where matters purely "local"—not concerned with commerce and navigation.

The Act does not authorize a commissioner to award compensation for injury to an **employee** not **"within the purview of the Act."** Such an award is not final. The mere locality of injury, therefore, is not sufficient to bring a case within the Longshoremen's and Harbor Workers' Compensation Act. Congress designed the Act to cover the "job hazards of maritime employees" while performing their work on navigable waters. The requirement is two-fold: (a) The employment and work must be in maritime, and (b) the injury must occur on navigable waters while the employee is engaged in the work he was employed and required to do.

This is shown by all the decisions of this Court, especially in **Crowell** v. **Benson** (Feb., 1932), 285 U. S. 22, 76 L. Ed. 598, 52 Sup. Ct. Rep. 285, Chief Justice Hughes, delivering the opinion, at page 287, said:

> "(1) First. **The Act has two limitations that are fundamental.** It deals exclusively with compensation in respect of disability or death resulting 'from an injury occurring upon the navigable waters of the United States' if recovery 'through Workmen's Compensation proceedings may not validly be provided by State law, and it applies only when the relation of master and servant exists. Sec 3. 'Injury.'

within the statute, 'means accidental injury or death arising out of and in the course of employment,' and the term 'employer' means one 'any of whose employees are employed in maritime employment in whole or part' upon such navigable waters. Sec. 2 (2) (4) 33 USCA, 902 (2, 4)."

"As the Act relates solely to injuries occurring upon the navigable waters of the United States it deals with maritime law, applicable to matters that fall within the admiralty and maritime jurisdiction. (Const. Art 3, sec. 2), citing cases." . . .

"This Court, at p. 271, said:

" 'An award not supported by evidence in the record is not "in accordance with law." '"

Id. 290:

"Moreover, the statute contains no express limitation attempting to preclude the court, in proceedings to set aside an order as not in accordance with law, from making its own examination and determination of facts whenever that is deemed to be necessary to enforce a constitutional right properly asserted. See Ohio Valley Water Co. v. Ben Avon Borough, 253 U. S. 287, 289, 40 S. Ct. 527, 528, 64 L. Ed. 908; Ng. Fung Ho. v. White, 259 U. S. 276, 284, 285, 42 S. Ct. 492, 66 L. Ed. 938; Prendergast v. New York Telephone Co., 262 U. S. 43, 50, 43 S. Ct. 466, 67 L. Ed. 853; Tagg Bros. &

> **Moorhead** v. **United States,** 280 U. S. 420, 443, 444, 50 S. Ct. 220, 74 L .Ed. 524; **Phillips** v. **Commissioner,** 283 U. S. 589, 600, 51 S. Ct. 608, 75 L. Ed. 1289. **As the statute is to be construed so as to support rather than to defeat it, no such limitation is to be implied. Panama Railroad Co.** v. **Johnson,** 264 U. S. 375, 390, 44 S. Ct. 391, 68 L. Ed. 748."

This Court, in **Crowell** vs. **Benson supra,** page 291, referring to contentions similar to those made in Petitioner's Brief under Specifications of Errors (1) and (2), at page 291, said:

> "(4) Apart from cases involving constitutional rights to be appropriately enforced by proceedings in court, there can be no doubt that the Act contemplates that as to questions of fact, arising with respect to injuries to employees **within the purview of the Act,** the findings of the deputy commissioner, supporter by evidence and **within the scope** of his **authority,** is final." . . .

This Court then discussed cases which could be "deemed to relate only to the determination of facts," within the purview of the Act and, in **Crowell** v. **Benson,** at page 292 said:

> "(7) The Congress did not attempt to define questions of law, **and the generality** of the **description leaves no doubt of the intention to reserve to the Federal court full authority to pass upon all matters which this Court had**

held to fall within that category. There is thus no attempt to interfere with, but rather provision is made to facilitate, the exercise by the court of its jurisdiction to deny effect to any administrative finding which is without evidence, or contrary to the indisputable character of the evidence, or where the hearing is inadequate, or unfair, or arbitrary in any respect. Interstate Commerce Commission v. Louisville R. R. Co., supra, at p. 91, 92 of 227 U. S., 33 S. Ct. 185; Tagg Bros. & Moorhead v. United States, supra. . . . "

This Court then discussed cases as to the power or right of administrative agencies to determine the facts "within the purview of the Act" and, at page 292, said:

"(8, 9) The present case does not fall within the categories just described, but is one of private right, that is, of the liability of one individual to another under the law as defined. . . . "

Id, 293:

"The statute has a limited application, being confined to the relation of master and servant, and the method of determining the questions of fact, which arise in the routine of making compensation awards to employees under the Act, is necessary to its effective enforcement." . . . "thus leaving open for determination the questions of fact as to the circumstances, nature, extent and conse-

quences of the injuries sustained by the employee for which compensation is to be made in accordance with the prescribed standards. Findings of fact by the Deputy Commissioner upon such questions are closely analogous to the findings of the amount of damages that are made according to familiar practice by commissioners or assessors, and the reservation of full authority to the court to deal with matters of law provides for the appropriate exercise of the judicial function in this class of cases."

At page 294 this Court then said:

"What has been said thus far relates to the determination of claims of employees within the purview of the Act. **A different question is presented where the determinations of fact are fundamental or jurisdictional, in the sense that their existence is a condition precedent to the operation of the statutory scheme. These fundamental requirements are that the injury occurs upon the navigable waters of the United States, and that the relation of master and servant exists. These conditions are indispensable to the application of the statute, not only because the Congress has so provided explicitly (section 3), but also because the power of the Congress to enact the legislation turns upon the existence of these conditions.**"

. . . . . .

"**In the present instance, the Congress nas imposed liability without fault only where the**

relation of master and servant exists in maritime employment, and, while we hold that the Congress could do this, the fact of that relation is the pivot of the statute, and, in the absence of any other justification, underlies the constitutionality of this enactment. . . . "

. . . . . .

"In relation to these basis facts, the question is not the ordinary one as to the propriety of the provision for administrative determinations. Nor have we simply the question of due process in relation to notice and hearing. It is rather a question of the appropriate maintenance of the federal judicial power in requiring the observance of constitutional restrictions. It is the question whether the Congress may substitute for constitutional courts, in which the judicial power of the United States is vested, an administrative agency—in this instance a single deputy commissioner—for the final determination of the existence of the facts upon which the enforcement of the constitutional rights of the citizen depend. The recognition of the utility and convenience of administrative agencies for the investigation and finding of facts within their proper province, and the support of their authorized action, does not require the conclusion that there is no limitation of their use, and that the Congress could completely oust the courts of all determinations of fact by vesting the authority to make them with finality in its own instrumentalities or in the executive department. That would be to sap the judicial power

as it exists under the Federal Constitution, and to establish a government of a bureaucratic character alien to our system, wherever fundamental rights depend, as not infrequently they do depend, upon the facts, and finality as to facts becomes in effect finality in law."

Id. 295.

"And where administrative bodies have been appropriately created to meet the exigencies of certain classes of cases and their action is of a judicial character, the question of the conclusiveness of their administrative findings of fact generally arises where the facts are clearly not jurisdictional and the scope of review as to such facts has been determined by the applicable legislation. None of the decisions of this sort touch the question which is presented where the facts involved are jurisdictional or where the question concerns the proper exercise of the judicial power of the United States in enforcing constitutional limitations.

"Even where the subject lies within the general authority of the Congress, the propriety of a challenge by judicial proceedings of the determinations of fact deemed to be jurisdictional, as underlying the authority of executive officers, has been recognized. . . . "

Id. 296.

"(11) . . . In the present instance, the

argument that the Congress has constituted the deputy commissioner a fact-finding tribunal is unavailing, as the contention makes the untenable assumption that the constitutional courts may be deprived in all cases of the determination of facts upon evidence even though a constitutional right may be involved. . . . "

Id. 297.

"The Congress has not expressly provided that the determinations by the deputy commissioner of the fundamental or jurisdictional facts as to the locality of the injury and the existence of the relation of master and servant shall be final. The finality of such determinations of the deputy commissioner is predicated primarily upon the provision (sec. 19 (a), 33 USCA 919 (a) that he 'shall have full power and authority to hear and determine all questions in respect of such claim.' But 'such claim' is the claim for compensation under the Act and by its explicit provisions is that of an 'employee,' as defined in the Act, against his 'employer.' The fact of employment is an essential condition precedent to the right to make the claim. The other provision upon which the argument rests is that which authorizes the federal court to set aside a compensation order as if it is 'not in accordance with law.' Section 21 (b), 33 USCA sec. 921 (b). In the absence of any provision as to the finality of the determination by the deputy commissioner of the jurisdictional fact of employment (in mari-

time), the statute is open to the construction that the court in determining whether a compensation order is in accordance with law may determine the fact of employment which underlies the operation of the statute. And to remove the question as to validity, we think that the statute should be so construed. . . .

. . . . . .

"Sec. 21 (b). The question in the instant case is not whether the deputy commissioner has acted improperly or arbitrarily as shown by the record of his proceedings in the course of administration in cases contemplated by the statute, **but whether he has acted in a case to which the statute is inapplicable.**"

. . . . . .

"We think that the essential independence of the exercise of the judicial power of the United States, in the enforcement of constitutional rights requires that the federal court should determine such an issue upon its own record and the facts elicited before it. The argument is made that there are other facts besides the locality of the injury and the fact of employment which condition the action of the deputy commissioner. That contention in any aspect could not avail to change the result in the instant case. But we think there is a clear distinction between cases where the locality of the injury takes the case out of the admiralty and maritime jurisdiction, or where the fact of employment being absent there is lacking under this statute any basis for the imposition of liability without fault, and those cases

> which fall within the admiralty and maritime jurisdiction and **where the relation of master and servant in maritime employment exists.** It is in the latter field that the provisions for compensation apply, . . . "
>
> "It cannot be regarded as an impairment of the intended efficiency of an administrative agency that it is confined to its sphere."

PETITIONER'S CONTENTIONS ERRONEOUS AS SHOWN BY TEXT BOOK WRITERS

This Court, in the above leading case, has answered every contention now urged in the Petition and in the Brief of Petitioner, and has conclusively showed that they are untenable.

On that point this Court in the Crowell case, at 295, inter alia, held:

> " . . . **that as to the jurisdictional fact of employment . . . the court, in determining whether a compensation order is 'in accordance with law,' may determine the fact of the employment which underlies the operation of the statute."**

This disposes of petitioner's contention II made in his brief at page 20.

This Court, also in numerous other cases has held that under Sec. 2 (4), in order to make the "employer" liable for compensation the injured or deceased employee **must be "an employee in maritime employment in whole or part** upon the navigable

waters of the United States"; and that Sec. 4 (a) **only** makes employers liable for compensation to employees "in maritime employment"; and that Sec. 5 makes **that liability** i. e. of maritime employers"—exclusive and in place of all other liability" of such employer to such deceased employee's "legal representative."

In **South Chicago Coal and Dock Co., et al,** vs. **Bassett, Deputy Commissioner** (1940), 60 S. Ct. 544, a case cited in the Petition for Writ of Certiorari at page 7, "as probably in conflict" with the decision of the United States Circuit Court of Appeals in the instant case, this Court also specifically refuted petitioner's contention, and held:

> "(Syl. 1) The general scheme of the Longshoremen's Compensation Act was to provide compensation to **employees engaged in 'maritime employment,'** except as stated in the act, for disability or death resulting from injury occurring upon navigable waters of the United States, where recovery through workmen's compensation proceedings might not validly be provided by state law."
>
> . . . . . .
>
> "(Syl. 8) The purpose of the Longshoremen's Compensation Act was to provide compensation **for a class of employees that worked on vessels in navigable waters,** who although they might be classed as 'seamen', were regarded as 'distinct from members of a crew,' being employees whose service was that of laborers of the sort performed by longshoremen and harbor workers as distinguished from

those employees on the vessel who were naturally and primarily on board to aid in her navigation."

"The question was required to be determined by the actual duties of the workman." (syl. 9.)

Chief Justice Hughes delivered the opinion of this Court in the Bassett case (as he did in **Crowell** vs. **Benson**) and cited **Nogueira** vs. **N. Y., New Haven and Hartford R. Co.**, 281 U. S. 128, 50 S. Ct. 303, 74 L. Ed. 754, and in 309 U. S. at 235, where this Court said:

"We had occasion to consider the purpose and scope of the Longshoremen's and Harbor Workers' Compensation Act. Its general scheme **was to provide compensation to employees engaged in maritime employment,** especially as stated, for disability or death resulting from injury occurring upon the navigable waters of the United States where recovery through workmen's compensation proceedings might not validly be provided by state law."

Id, 256:

"This Court also held **that in the case of a longshoreman who was injured on the land,** although engaged in unloading a vessel, **the local law governed and hence the workmen's compensation law of the state applied. State Industrial Commission** vs. **Nordenholt Cor-**

poration, 259 U. S. 263, 42 S. Ct. 473, 66 L. Ed. 933, 25 A. L. R. 1013."

So that the decision of this Court in the Bassett case sustains the decision of the Circuit Court of Appeals in the instant case, holding that the Court may determine for itself the jurisdictional question as to whether the deceased was an employee in maritime, and, although maritime, whether the local law governed, and hence held that Armistead's employment was non-maritime and local and that compensation might have been validly provided by state law. 116 U. S. 773 (5).

The above decisions of this Court have refuted Petitioner's contentions made in Petition, pages 6-7, and Petitioner's Brief, pages 7-11; 20-24, and held that Congress has not . . . provided that the determinations by Deputy Commissioners of the "fundamental or jurisdictional" facts as to (a) either the locality of the injury, or (b) the existence of the relation of master and servant in maritime employments "shall be final"; and held that the fact of employment in maritime is an essential condition precedent to the right to make the claim; and that, in the absence of any provision in the Act as to the finality of the determination of the Deputy Commissioner of the jurisdictional fact of employment in maritime, the statute means that the Court, in determining whether a compensation order is in accordance with law, may itself determine whether the fact of employment is in maritime and that fact underlies the operation of the statute.

As to that question, this Court further held:

"And to remove the question as to validity, we think that the statute should be so construed. . . . "

"Even where the subject lies within the general authority of the Congress, the propriety of a challenge by judicial proceedings of the determinations of fact deemed to be jurisdictional, as underlying the authority of executive officers, has been recognized. . . . "

This Court also ruled:

"In **Grant Smith-Porter Co.** v. **Rohde,** (1927) 257 U. S. 469, 42 S. Ct. 157, 66 L. Ed. 321), the proceedings was to recover an award under a Workmen's Compensation Act from a shipbuilder for injuries which a carpenter received while he was working on an unfinished vessel moored in the Willamette river (a navigable river), **the Court held, the contract for constructing the vessel was non-maritime, and although the uncompleted structure upon which the accident occurred was lying in navigable waters, neither Rohde's general employment nor his activities at the time had any direct relation to navigation."**

Also in **Alaska Packers' Association** v. **Industrial Accident Commission,** 276 U. S. 467, 48 S. Ct. 346, 72 L. Ed. 656, a person engaged by a fishing and canning company as a season, also as a fisherman, and then for general work in and about a cannery, was injured after the fishing season was over and while **standing**

upon the shore and endeavoring to push a stranded fishing boat into navigable waters for the purpose of floating it to a nearby dock, where it was to be lifted out and stored for the winter. It was held, that that injury, even if within admiralty jurisdiction, was of such a local character as to be cognizable under a state compensation law, a ruling which would not injure the characteristic features or uniformity of the admiralty law." So it should have been held here.

> Also "In Sultan Railway Co. v. Department of Labor and Industries of the State of Washington, 277 U. S. 136, 48 S. Ct. 505, 72 L. Ed. 820, an award for injuries under the Workmen's Compensation Law of Washington . . . was sustained. The plaintiff was engaged in assembling saw logs in booms for towage elsewhere for sale, and the breaking up of the booms which had been towed on a river to a sawmill and the guiding of the logs to a conveyor extending into the river by which they were drawn into the mill for sawing. Clearly, even if this had any admiralty feature, it had only an incidental relation to navigation. The rights and obligations of the employees and their employers could well be regulated by local rules, which would not work material prejudice to the characteristic features of the general maritime law."

OTHER FEDERAL COURT DECISIONS

The Circuit Courts of the United States, in construing the Federal Compensation Act as to the above

fundamental and jurisdictional questions, have followed the above decisions of this Court.

They have held that the Act requires the Court to make an independent examination and determine (1) whether the relation of master and servant exists in maritime, and (2) whether the injury occurred upon the navigable waters of the United States while performing work he had been employed or ordered to do.

In **Massman Const.** v. **Bassett, Dep. Comr., et al** (1940), 30 Fed. Supp. 813, the Circuit Court of Appeals for Circuit said:

> "The main point urged by plaintiff in its effort to set aside the award of the Federal Commission is that the United States Employees' Commission **was lacking in authority to entertain the claim of defendants, because the deceased was not engaged 'in maritime services' at the time of the accident which resulted in his death. . . . citing "Crowell** vs. **Benson,** 285 U. S. 22, 52 S. Ct. 286, 76 L. Ed. 598; **South Chicago Coal and Dock Co.** v. **Bassett,** 7 Cir., 104 F. 2d 522. Such a finding is essential to jurisdiction to make any award under the Act."
>
> . . . . . .
>
> "Section 902 (4): 'The term 'employer' means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any dry dock)'."
>
> . . . . . .
>
> "(2, 3) The Longshoremen's and Harbor

Workers' Compensation Act **was designed to provide for maritime workers a remedy similar to that provided by state compensation laws. Crowell** v. **Benson, supra; Donald** v. **Baltimore & Ohio R. Co.,** 4 Cir., 71 F. 2d 810. . . . "

"(5-7) **A maritime contract is a contract which relates to the actual business of navigation.** A contract for building a ship or supplying material for its construction is not a maritime contract for it does not deal with the use of the vessel upon navigable waters. **Roach** v. **Chapman,** 22 How. 129, 16 L. Ed. 294; 2 C. J. S., Admiralty, page 98, Sec. 38. **Agreements to provide mere facilities for navigation are not maritime.** Hence plaintiff's contracts to build the dam was a matter of local concern and not within the admiralty jurisdiction.

"(8, 9) Maritime service has some direct relation to a vessel employed in trade, commerce, or travel upon navigable waters." . . . "The work of the deceased on the land in a cofferdam was not service performed 'upon navigable waters,' and it was not maritime in its nature because it was the design of the project to provide a nine foot channel as an aid to navigation. The improvement of the channel may aid navigation, so may the building of a ship, but neither is directly a part of any undertaking to carry on trade, commerce, or transportation upon public waters. The Sirius, D. C. 65 F. 226; 38 C. J. 1192.

"In **Grant Smith-Porter Ship Co.** vs. Rohde, 257 U. S. 469, 42 S. Ct. 157, 66 L. Ed. 321, 25

A. L. R. 1008, a carpenter employed on a ship nearly completed, launched in navigable water, was not engaged in maritime employment because his service had no direct relation to commerce or navigation.

"In **Miller's Indemnity Underwriters** vs. **Braud et al,** 270 U. S. 59, 46 S. Ct. 194, 70 L. Ed. 470, a diver engaged in removing submerged timber from a navigable river to aid navigation was not employed in maritime service.

"In **Sultan Railway & Timber Co.** v. **Department of Labor, etc.,** 277 U. S. 135, 48 S. Ct. 505, 72 L. Ed. 820, it was held that workmen engaged in assembling saw logs in booms for towage elsewhere were not in maritime employment, but in service of local character and concern.

"In **United States Casualty Co.** v. **Taylor,** 4 Cir. 64, F. 2d 521, it was determined that a workman engaged in building of a new ship launched but not completed was not in maritime service and state compensation law applied.

"In **Jeffers** v. **Foundation Co.,** 2 Cir., 85 F. 2d 24, it was held that a diver employed to help in building a pier of a bridge across the Ohio River injured while standing inside a cofferdam was not entitled to recover under the Longshoremen's Act because he was not upon navigable waters at the time of the accident.

"(10) The cases give expression to the doctrine by which the present controversy

must be determined. The conclusion to be drawn is (1) that the deceased at the time of his injury was not employed upon navigable waters; (2) that he was not engaged in maritime employment; (3) and that the Compensation Law of Missouri validly furnished a mode of redress."

. . . . . .

"Concluding as we do that Harold Reid Bolting was not engaged in maritime employment, it follows that the United States Employees' Compensation Commission was without authority to enter the award in question."

In **Fidelity Cas. Co.** vs. **N. Y.** vs. **Burris,** 59 Fed. 2d, 1042 at 1043, the Court said:

"(1) It is first insisted that both the lower court and ourselves are bound by the findings of fact of the deputy commissioner, but it is sufficient to say as to this that we have many times held that, upon a review of the record made before the deputy commissioner, our duty is to determine whether his order was or was not in accordance with law, and this depends upon whether the testimony taken before the deputy commissioner will sustain his finding." . . . "As we view the matter, there is no evidence on which to sustain the deputy commissioner's finding."

So it is in the instant case. Armistead, the decedent, was a "non-maritime employee" and was not an employee in maritime employment and did not

come within the purview of the Act; and there was likewise absolutely no evidence to sustain the Deputy Commissioner's findings and award.

In Robinson on Admiralty, Chap. 3, p. 76, the latest text writer on the subject, the learned author says:

> **"Mere locality,** therefore, is not enough to bring a case under the Longshoremen's and Harbor Workers' Act. Congress has made a statute designed to cover **the job hazards** of **maritime workers** while laboring on the water. **The requirement is that maritime character in the work coincide with locality of the injury."**

At page 93, "Workmen's Compensation Act," he says:

> **"(14) State Compensation Acts may apply to maritime injury if the matter is 'maritime but local'."**

Id. p. 101:

THE 'MARITIME BUT LOCAL' DOCTRINE

> "14. The Supreme Court developed a doctrine that matters 'maritime but local' may be left to the states and by this exception many cases of maritime injury **lex loci** are compensable under state compensation acts. In 'local' matters uniformity is not required.
>
> **"The local aspect of the matter has been**

made to depend on the character of the injured man's work. If the work is maritime, and the locus also maritime, the state act is excluded from operation. For non-maritime workers the state act may apply even though the place of injury is in fact on navigable waters."

"The test for the exclusion of state acts was not whether or not the injury occurred upon the maritime waters. This would be clear-cut cleavage. The Supreme Court, however, now made the simple test of mere 'locality' of no avail."

Id. pp. 103-105:

"The nub of the 'local exception' doctrine, of course, lies in the court's definition of 'local.' 'Local' does not have to do with locality; all the cases are those of an injury which is localized on the waters, not on the land. The definition has become bound up with the character of the man's work. By the mere test of locality the injury is maritime in all the cases. This is the common factor. The character of the work is the variant. If the work is 'maritime' the state compensation acts are excluded; if it is non-maritime, the state compensation act is applicable. The 'local' doctrine was explicitly set forth in Grant Smith-Porter Ship Co. v. Rohde. There the shipbuilder had launched a newly constructed ship, still in an unfinished state, undelivered and uncommissioned. But it was afloat in navigable waters when Rohde, who was at work on it as a car-

penter or joiner in the builders' employ, was hurt. He sued in admiralty, alleging the shipbuilding company's negligence. The employer relied upon the State Compensation Act By its provisions the remedy it gave was exclusive. The court said: 'The contract for constructing the 'Aloha' was non-maritime and although the incompleted structure **was lying in navigable waters,** neither **Rohde's general employment nor his activities had any direct relation to navigation or commerce.** Under such circumstances regulation of the rights, obligations, etc., by a local rule would **not necessarily work material prejudice to** any characteristic feature of the **general maritime law,** or interfere with the proper harmony or uniformity of that law.' Justice McReynolds referred to the Garcia decision and said: 'The **present case is controlled by that case's principal'** and 'this conclusion accords with **Southern Pacific Co.** v. **Jensen.**' Rohde's suit in admiralty failed and he was remitted to his remedy under the state compensation act. The thesis that if injury may be labeled 'local' the state law **is made applicable was thus established. . . . "**

Id. p. 106:

"From the authorities we deduce: . . .

(3) If an injury occurs on navigable waters and in the performance of a maritime contract, it is certainly within the exclusive jurisdiction of the admiralty unless (a) the contract is of merely 'local concern'; and (b) its perform-

ance has no direct effect upon navigation or commerce; and (c) the application of the state law 'would not necessarily work material prejudice to any characteristic feature of the general maritime law, or interfere with the proper harmony or uniformity of that law in its international or interstate relations.' (4) State workmen's compensation laws, contractual in character, are applicable to maritime service on navigable waters, when and only when the service is within exceptions (a), (b), and (c) above. **(5) If, however, the injury occurs on navigable waters, but in the performance of a non-maritime contract, it is, at least prima facie, local and within the operation of state laws.** If there are any exceptions to this rule, they are yet to be developed."

Id. pp. 107-108:

"In the **Lake Gorian, Employers' Liability Assurance Co., Limited, of London, England,** v. **Cook,** the Fifth Circuit Court of Appeals had before it the injury of a man employed by the Ford Company primarily as a mechanic assembling automobile parts, which, as they came in on Ford ships, were unloaded by the employees of the assembling plant. Cook, while engaged in unloading, was injured on board one of the ships by what the court called 'pure accident,' so that unless under the State Compensation Act there was no recovery as for a maritime tort. The Circuit Court applied the State Act, saying: **'We think . . . that the matter of**

unloading these ships . . . at rare intervals was 'of mere local concern'."

Id. p. 110: At the end of note 67, it is said:

" . . . The Act does not apply to non-maritime employment upon navigable waters. Injuries occurring in the latter status no doubt may be validly compensated under a State law if it so provides."

Id. pp. 119-120:

"Knudson's Case, Crowell v. Benson, the Supreme Court distinguished 'jurisdictional facts' and excepted them from the administrative finality, otherwise recognized. What has been said thus far relates to the determination of claims . . . within the purview of the Act. A different question is presented where the determinations of fact are fundamental or 'jurisdictional,' in the sense that their existence is a condition precedent to the statutory scheme. These fundamental requirements are that the injury occurs upon the navigable waters of the United States and that the relation of master and servant exists. 'These fact requirements are thus given equal weight.' Should these conditions not exist, Chief Justice Hughes continued, 'there is no ground for the assertion that the person . . . could constitutionally in the absence of fault on his part be subjected to the liability which the statute creates.' For the application of the Harbor

> Workers' Act the workmen must be injured under the same conditions concerning locality which are required to be found as the basis of admiralty jurisdiction in tort generally."

At page 121, the learned author under the heading, "THE OCCUPATIONS WITHIN THE APPLICATION OF THE HARBOR WORKERS' AND LONGSHOREMEN'S ACT," said:

> "*2. The injuries occurring in the latter status no doubt may be validly compensated under a state law if it so provides."
>
> **"Not only must the locality be settled. The man's occupation at the time of his injury must also be determined."**

And at page 122:

> "The qualification is this: **even though the employee is injured while engaged in work on navigable waters,** his rights are to be determined under the state workmen's compensation act, if the enterprise upon which he is at the time **engaged is a purely local matter and not concerned with commerce or navigation.** . . . "

Od. p. 123:

> **"In re Herbert** Chief Justice Bugg for the Massachusetts Supreme Court held that the Compensation Act of the state was applicable in curious circumstances. Herbert worked on

a scow, owned by the Coleman Disposal Company, and used to ferry garbage to an island two miles away in Boston Harbor. Herbert's job was to **sweep the scow** after its unloading, and he was at work while it tied up at the island when he fell overboard. **After reciting the standard** Supreme Court decisions the court said: **'It seems to us difficult to conceive of anything more local in its general nature. . . . It does not appear that the deceased had any work directly connected with maritime affairs'."**

See also pp. 131-132, 174.

"There is no presumption in favor of jurisdiction. Ex parte Smith, 1876, 94 U. S. 455, 24 L. Ed. 207. It must affirmatively appear. Robertson v. Cease, (1878) 97 U. S. 646, 27 L. Ed. 1057."

"In **Sultan Railway Co. v. Dept. of Labor, etc.,** (cited **supra),** it was held, that, even if the employee's work had any admiralty feature, it had only incidental relation to navigation, and that the rights and obligations of such employee and those of his employer could be regulated by local or State law, without working material prejudice to the characteristic feature of the general maritime law."

PETITIONER'S FACTUAL CONTENTIONS ERRONEOUS, AND NOT SUPPORTED BY SUBSTANTIAL EVIDENCE

On page 5 of Petitioner's Brief it is stated:

> "So much is undisputed. In addition, there was evidence that on at least one occasion respondent had taken a prospective customer for a boat ride on navigable water for the purpose of interesting him in buying a cruiser (R. 24). There was also testimony that from time to time respondent would send its **mechanic** to repair ignitions or otherwise service customers' boats on navigable water if they 'needed anything,' the mechanic sometimes accompanying the customer on test trips in order to 'adjust the carburetor or anything like that' (R. 24-25, 31-34). The mechanic testified that on the date in question he either told Cooper 'to take George (decedent) or I told George to go and help' (R. 40). Finally, there was evidence that customarily when decedent was sent out from the store he was subject to 'orders' and, **supposedly,** would be subject to the orders of respondent's white employees (R. 29)."

In the instant case there was not only no substantial evidence to support the above contentions, but all the evidence shows that the decedent was not employed in maritime employment and that when his death occurred by drowning he was at a place, namely, on the James River, where he had not been employed, ordered, directed or required to be.

Moreover, the Deputy Commissioner himself found that the decedent's death resulted from drowning in the James River **"while he was employed as a janitor and handyman" (R. 7).** That he was so employed and instructed not to go on or work on navigable or other rivers and went "of his own accord" (R. 45), is shown by all the evidence. See evidence (R. 38; 40-41; 41-42; 45; 46, 47; 49-50, 51).

Decedent's contract of employment, his instructions and the work he was specifically ordered to do on the day he was drowned, were all non-maritime. In these circumstances, even if his injury and death occurred on navigable waters, it is, at least, prima facie local and within the operation of State law—purely a local matter not concerned with commerce or navigation.

The contention that because the respondent was selling marine supplies, small boats and outboard motors at its store, and that **"On occasions"** its employees (mechanics) went aboard vessels of the owners—third parties—and tested out the ignitions on trips on navigable waters, that George P. Armistead, Jr., the janitor, handyman and decedent—was, therefore, an employee in maritime, is a non-sequiter—since all the evidence shows that the decedent was not an employee in maritime employment, was not ordered or required to go upon or do any work on navigable waters, and that neither his employment nor work took or required him to go on navigable waters or to be at the place he was when he was drowned.

The further suggestion that because Sec. 2 (4) of the Act means "an employer any of whose employees are employed in maritime emploment in mari-

time employment upon navigable waters," that this makes the decedent an employee in maritime and that the Deputy Commissioner could look to the employment activities of other employees and not merely to the employment and duties of the decedent, is without substance. This contention impliedly concedes, what all the evidence shows, that the decedent's employment was not in maritime and that he was not a maritime employee.

If, however, Petitioner's construction of the Act be adopted, which we protest, it would render the Act unconstitutional because it would enable a non-maritime employee who violated his contract of employment and his specific instructions and orders, to recover for an injury he sustained simply because some other employee who was not injured may have on **rare** occasions engaged in working on navigable waters, and would enable the decedent, a non-maritime employee, to recover even though his injury or death did not "arise out of and in the course of his employment," and who went of his own accord (R. 45) upon navigable waters where he was not employed, directed or required to go, and even if recovery through workmen's compensation proceedings might validly be provided by State law, and his employment and work were purely of local concern—not concerned with commerce and navigation.

Such "rare" occasions does not show, either as a matter of fact or law, that the "occasional" matter, referred to on page 5 of Petitioner's Brief, made or constituted the other employees in maritime employment, or other than local work.

As was said by Chief Justice Bugg in re. Herbert (1933), 283 Mass. 348, 186 N. E. 544:

> **"It seems to us difficult to conceive of anything more local in its general nature. . . . It does not appear that the deceased had any work directly connected with maritime affairs."**

Also see **St. John** v. **Thompson,** 108 Ver. 66, 182 A. 196.

There St. John was employed to go with his employers to a summer resort on Lake Champlain, where he was to work on land (as was Armistead, the decedent here), and was also to do what was required of him as to a motor boat that was to be operated on the lake (navigable water). The motor boat became disabled on the lake and a row boat was procured and moored to the motor boat. This mooring became unloosed and the row boat drifted away from the motor boat. St. John, in an attempt to retrieve the row boat, was drowned. The (Vermont) Court held that his employment was maritime and that he could not recover under the state law, and, in this connection, said that "since the accident happened on navigable water, the mere fact that the major portion of St. John's employment was upon land was unimportant. . . . But this was only following **Northern Coal and Dock Co.** v. **Straud,** 278 U. S. 142, 49 S. Ct. 88, 73 L. Ed. 232."

The Circuit Court of Appeals in the instant case, 116 Fed. (2) at 793, distinguished that holding and said:

> "This leading case, we think, can easily be distinguished from our case. **An appreciable part of St. John's employment must necessarily have been on navigable waters in the**

> **motor boat.** In the instant case, however, Armistead was hired as a janitor and cautioned never to go on navigable waters."

Armistead's, the decedent's, contract of employment was not only for work to be done by him as a janitor on land but he was specifically instructed never to go on boats or navigable waters, and the orders given him on the day he was drowned showed that his work was to be done on land and did not require him to get in the Crown boat and take a ride on navigable waters. This he did "of his own accord" (R. 45).

Furthermore, the mere fact that some of respondent's other employees may have "occasionally" gone on boats **owned by other people** at their request and even have done the things mentioned, would not make them employees in maritime employment nor make their occasional work "maritime," and the evidence of George W. Todd, a witness called for claimant on this point showed (R. 23):

> "Q. How often would your employees go aboard any boat; every day?
>
> "A. No, sir; not every day. It was just a rarity that we got on boats. **We haven't got any business getting on other people's boats."**

Certainly, the "occasional" work referred to would not make the decedent, George P. Armistead, Jr., or such other employees "employees in maritime employment," even if such other employees did adjust

the carburetor and thinge like that on other people's boats.

Furthermore, the suggestion made in the Brief that, although Armistead went upon Crown's boat "of his own accord" (R. 45) and contrary to his contract of employment and instructions, that his riding in the boat with his face to the front was "helpful" to Cooper, who was driving the Crown boat for him at that time, would not make Armistead, the decedent, an employee in maritime employment, nor make his death which resulted from his riding in the boat of his own accord "arise out of and in the course of his employment."

The further argument made in the Brief (page 26) that,

> "Here the issue correspondingly turns on the facts with respect to decedent's general duties as handyman, the particular instructions he had received, the purpose of his accompanying Cooper on the trip on the river, the service performed by him as a lookout, the relationship between him and Cooper, and Cooper's acquiescence or approval of his presence in the boat made the decedent an employee in maritime,"—

is contrary to the evidence and is without substance.

All the evidence shows that Cooper was not a superior employee of George P. Armistead, Jr., that he had no right or authority to change the decedent's contract of employment, his defined and specific work he was instructed to do; and that Cooper never claimed or attempted to be decedent's superior em-

ployee; he never ordered or directed him to get in the Crown boat or to ride therein (R. 45), or to keep a lookout or perform any work on the water on the trip (R. 41-42; 45-46). The mere negative fact that Cooper did not instruct Armistead, the decedent, not to go upon navigable waters cannot change the character of his contract of employment as a janitor and handyman, or enlarge the character and kind of work he was directed to do on the day he was drowned, or authorize him to violate the specific instructions that he was given when employed "never to go on boats upon navigable waters or any other kind." The uncontradicted evidence shows that neither Cooper nor Crown, the owner of the boat, nor anybody else authorized, ordered or required Armistead to get in the boat and go out in it on the river or to take the trip, or to keep a lookout or to render any service or do any act. Neither Cooper nor Crown had any authority to give such orders or directions and they gave none. (R. 41-42; 45). Also see **De Fillippis** v. **Falkenberg**, 249 N. Y. 581.

In **Ferry Co.** v. **Beers**..... this Court said:

> "So far from the contract being purely maritime and touching rights and duties pertaining to navigation (on the ocean or elsewhere), it was a contract made on land to be performed on land," and
>
> "Admiralty jurisdiction in cases of contracts, depends primarily upon the nature of the contract, and **is limited** to contracts, claims and services purely maritime and touch-

ing rights and duties appertaining to commerce and navigation."

All the evidence shows that neither the decedent's contract of employment, specific instructions, orders nor services were maritime. They did not touch the rights and duties appertaining to commerce and navigation.

CASES CITED BY PETITIONER NOT IN POINT AND DISTINGUISHABLE

The basis error of the learned counsel for Petitioner in discussing the case is—

That they fail to distinguish between jurisdictional and administrative findings—fail to recognize that, in order to give a United States Commissioner jurisdiction under the Act to award either compensation or damages to an injured or deceased employee, such employee must be "an employee in maritime employment"—fall within the purview or coverage of the Act,—and the award must be in accordance with law, and that the injury or death must result while engaged in maritime employment on navigable waters—where he was required to be.

This fundamental error runs through the argument in Petitioner's Petition and Brief in discussing the cases. In doing so, they either disagree with this Court, or overlook or disregard the decisions of this Court, especially in **Crowell** v. **Benson**, cited **supra**, where this Court said (297 S. Ct.):

> "In the absence of any provision as to the finality of the determination by the Deputy

> Commissioner of the jurisdictional fact of employment, the statute is open to the construction that the Court in determining whether a compensation order is in accordance with law, may determine the fact of employment which underlies the operation of the statute. And, to remove the question as to validity, we think the statute should be so construed."

And at page 292:

> "The Act is made to facilitate the exercise by the Court of its jurisdiction to deny effect to any administrative finding without evidence, or, contrary to the indisputable character of the evidence . . . or arbitrary in any respect."
> Id. 294-296.

The claim of the injured or deceased employee must not only be of or for an employee in maritime employment and fall within the purview of the Act and be according to law, but the administrative findings committed to the determination of a Deputy Commissioner must also be supported by **substantial** evidence,—not without evidence or against it.

The case of **South Chicago Coal & Dock Co.** v. **Bassett,** 309 U. S. 544, et seq., referred to in the Petition at page 7 as "in probable conflict with the decision of the Court below" does not support the suggestion.

That case was decided by Chief Justice Hughes as was the case of **Crowell** v. **Benson, supra,** and at page 547 this Court held:

> "(1, 2) In **Nogueira** v. **N. Y., N. H. and Hartford R. Co.**, 281 U. S. 128, 50 S. Ct. 303, 74 L. Ed. 754, we had occasion to consider the purpose and scope of the Longshoremen't and Harbor Workers' Compensation Act. Its general scheme was to provide compensation to employees engaged in maritime employment, except as stated, for disability or death resulting from injury occurring upon the navigable waters . . . , where recovery through workmen's compensation proceedings might not validly be provided by State law. . . . "

But the Court also held that in the case of a **"longshoreman** who was injured on the land, although engaged in unloading a vessel, the local law governed and hence the workmen's compensation law of the State applied."

> "And in thus providing Congress had constitutional authority to define the classes of such employees who should receive compensation and to exclude those described in Section 3, **Nogueira v. N. Y., N. H. and Hartford R. Co., supra."**

In the Bassett case John Schumann, the deceased employee, had been employed in maritime employment and that he was drowned on navigable waters while engaged in doing the work he had been employed and directed to do." The **only question there before the Court** was whether or not he was a "mem-

ber of a crew of a vessel" and fell within the exception mentioned in the Act.

This Court deciding that question, at page 548 said:

> **"So far as the decision that this employee, who was at work on this vessel in navigable waters when he sustained his injuries, was or was not "a member of a crew" terns on question of fact, the authority to determine such questions has been confided by Congress to the Deputy Commissioner."**

It was conceded that he was a "maritime employee" and fell "within the purview of the Act," and was serving "as a laborer and as a longshoreman,"—and not as a "member of a crew." So that the Deputy Commissioner was not called upon in that case to decide any of the **jurisdictional** questions mentioned in the quotation **supra,** in the decision of this Court in the Crowell case. The distinction between the two cases is obvious.

In note 3, page 7 of the Petition, counsel for Petitioner argue that the Deputy Commissioner "could give little weight" to the uncontradicted evidence that Armistead, the decedent, "had been instructed not to go on boats in the water (R. 73, 74, 77), and could draw an inference **contrary** to all the uncontradicted evidence and predicate his decision upon such inference, and make a finding without "substantial" evidence.

We respectfully submit that such is not the law. The case of **Bull Insular Line, Inc. v. Scwartz,** 23 S. Ct. 359 (E.D.N.Y.) does not sustain the above contention of Petitioner.

In that case Vascone sustained injury "while employed in maritime employment" to work on board a steam ship on navigable waters, and died as a result of his injury. All the evidence showed that he was employed in maritime employment as a longshoreman and engaged in unloading a cargo from a steam ship, the specific work he had been employed to do. It was contended that his death was not caused by injury sustained "in the course of his employment," on the ground that Vascone's orders forbade him from going on the ship. The evidence on that point showed that at the time he went on the ship "it was raining," and that it was **customary** for dock men (like Vascone) to stand on bags of sawdust or dunnage boards to prevent their feet from getting wet, which were kept sometimes on the dock and sometimes on the ship; and that the hatch covers had been removed, in consequence of which the deceased fell into the hold of the vessel and had died from his injury; that Vascone before his death had said he had gone between the deck to obtain a plank to place under his feet because it was raining; that there were no boards on the dock and he went on to the ship to get some. The Deputy Commissioner found:

> **"I believe that the plaintiff failed wholly to sustain the burden of proof on the question of the existence of a rigid rule, the violation of which would take the offender out of the scope of his employment."**

In that case Vascose was employed "as a longshoreman" to work on the dock and he clearly fell "within the purview of the Act." In the instant case

Armistead was a "janitor" employed to work on land, with instructions not to go on navigable waters, and none of his work or duties required him to get in the Crown boat or go riding on the river.

The instant case, therefore, falls within the case of **Hyatt** v. **U. S. Rubber Reclaiming Co., Inc.**, 230 App. Div. 743, 243 N. Y. S. 474, and of **Erdberg** v. **United Textile Print Works**, 216 App. Div. 574, 216 N. Y. S. 275. There the Court, in the Hyatt case, quoting from the Endberg case, said (page 475):

> "Disobedience of an order may do no more than to establish a fault on the part of an injured employee. In that case the employee would not lose his right to compensation. The order, however, may go further. It may so restrict the activities of the employee that its violation would place him outside of the sphere of his employment, in which case compensation would not be payable. The employee 'is beyond the sphere of his employment if he is injured in the course of doing the thing forbidden.'
>
> "The order or rule of the employer restricted the activity of the claimant; it excluded him from working on a machine in the mechanical department. When injured he was not doing that for which he was employed. He was performing an act not contemplated by his employer under the rule which he says had been promulgated and of which he was informed. When doing the thing forbidden, he was outside of his employment."

The case of **Maryland Casualty** v. **Cardillo, Dep. Commr.**, 107 Fed. (2d) 959, cited by Petitioner, is also not controlling in the instant case.

There the decedent, Najjum, was employed to collect insurance premiums. It was his duty to turn in his accounts in the evening. At the end of the day before he turned in his accounts and while on his way to do so, he was picked up by an automobile party and attacked and robbed, and died as a result of his injuries. Suit was brought against the Insurance Company for compensation. The Deputy Commissioner found that the criminal risk or hazard to which Najjum was subjected was "peculiar to and increased by his employment as an insurance collector, and that the assault and robbery were because of his employment and that his injury and death, therefore, arose out of and while he was in the course of his employment."

In that case Najjum's employment and duties exposed him to the risk, caused him to be attacked, robbed and injured. In the instant case Armistead's employment did not require him to get in the Crown boat and take a ride on navigable waters. He was not only not employed to do this but he was expressly instructed not to get in boats or go upon navigable waters. The danger that resulted in his drowning was caused solely by his act and not by his employment, and in disregard of his contract of employment, positive instructions and the orders given him.

As was said in the Hyatt case **supra**, Armistead's violation of his contract of employment and his specific orders "placed him outside of the sphere of his employment, in which case compensation would not

be payable" . . . . They excluded him from working on navigable waters. When the boat capsized and he drowned, he was not doing or performing any work he had been employed, ordered or required to do, and this wrongful act on his part was not contemplated by his employer or required by his employment and was wholly without the fault of his employer, who is now sought to be unjustly and inequitably mulcted in damages for the death of a nonmaritime employee whose injury and death resulted from his own wrong and in violation of his employment and instructions.

The other cases cited in the Petition and in the Brief of Petitioner are clearly distinguishable from the instant case on similar grounds to those above, as an examination of them clearly shows.

In **Wood Towing Corp.** vs. **Parker,** 76 Fed. (2d) 770 (CCA 4th), the corporation was engaged in operating tugs, barges, etc., in the harbor of Norfolk, and incident thereto conducted a small repair shop or yard in that city. The deceased Trollinger, the employee, was hired as a carpenter and general utility man at the shipyard, and, acting under orders of the Superintendent, was assisting in the installation of a new engine on a motor boat moored in the harbor a few feet from the dock when drowned. When last seen alive he was on the boat in the cockpit of the boat. He was employed in maritime employment. The locus of his injury, contract of employment and the work he was required to do and was performing, were all in maritime.

The Court, at page 772, said:

"Of course, the mere fact that the accident

occurred over water, and that the man's body was found in the water, is not sufficient to confer **jurisdiction** upon the United States Commissioner but the ultimate facts on which his **jurisdiction** are based must be proved; otherwise, the Act is **inapplicable. Of course, if the Federal Act is inapplicable, the Commissioner would be without jurisdiction and his award would be subjected to injunction by a Federal District Court."**

In **Lawson, Dep. Comr. v. Maryland Casualty Co.,** 94 Fed. (2d) 193 (CCA 5th), Rolle, the employee, was employed as a longshoreman and harbor worker and was put into a boat belonging to the dredge company to do the work desired and he was working in that boat on navigable waters under the direct direction of his superior. The locus of the injury, contract of employment, and work he was required to do and was performing, were all in maritime. The Court held:

"Syl. 1. A row boat less than sixteen (16) feet long, propelled by one oar at its stern is **not** a 'vessel,' having a crew within the Longshoremen's and Harbor Workers' Compensation Act.

"A person engaged in dynamiting bottom of channel entering Miami Harbor when he was killed, was not **'a member of the crew of any vessel'** within the Longshoremen's and Harbor Workers' Compensation Act, hence his death was compensable under the Act."

In **Wheeler Shipyard, Inc.**, vs. **Lowe, Dep. Comnr.**, 13 Fed. Supp. 863, affirmed 82 Fed. (2d.) 1022 (CCA, 2d), Thomas Murphy was employed as a painter to paint boats in the water and in the yard. On the day of his injury and death he was instructed to take a motor boat to a customer at Rockaway, L. I., and assist him to tow back to the employer's yard two other motor boats. The two boats to be picked up were made fast by lines to the Sound Wave, and the journey begun, the waters being traversed were all navigable. While the boats were in the Atlantic Ocean a storm arose and one of the boats broke loose, and **Harmitz** called upon upon the deceased to take the wheel of the Sound Wave. Harmitz was washed overboard. Later he discovered that Thomas Murphy had disappeared. His body was recovered and it was established that he had died from drowning. The Court held he was both employed and engaged in maritime employment on navigable water.

The Court of Appeals affirmed the award, held that it was the Court's function to determine whether the Deputy Commissioner acted in accordance with law.

II.

WANT OF JURISDICTION

PROCEEDINGS NOT BEGUN OR PROSECUTED BY PARTY HAVING A CAUSE OF ACTION OR LAWFUL RIGHT —AND VOID

THE PETITION FOR WRIT OF CERTIORARI

was filed by the Solicitor General of the United States by and in the name of and on behalf of E. V. Parker, Deputy Commissioner, United States Employees' Compensation Commission.—It was not filed by or in the name of Jessie B. Armistead, widow, the claimant, for herself and three minor children who were made parties to the suit; by Guardian ad Litem; nor by the "legal representative" of the decedent,—as the Act, Section 5, requires,—no "legal representative" of George P. Armistead, Jr., having ever been appointed.

SUMMARY OF ARGUMENT

The right to file claim statutory. It must be filed by deceased employee's "legal representative" (Sec. 5 L. S. & H. W. Comp. Act). Sec. 12 refers to notice of injury or death. Sec. 13 to time for filing claims by injured, or in case of his death by his "legal representative." The objection here is to failure of "legal representative" to file claim at all. The proceeding is not brought by party having any legal right. Want of jurisdiction in Deputy Commissioner to make

award and District Court to enter judgment approving it and in Deputy Commissioner to file Petition for Writ of Certiorari.

First. The objection here is **not** for failure to file the claim within the prescribed period, **but it is that no claim at all had ever been filed by the "legal representative,"** and that Jessie Booker Armistead, who filed the claim on behalf of herself and infant children of the deceased, has no standing in such case and no authority to "elect to claim compensation or to file the claim or to maintain an action . . . for damages on account of such death." Such claim, under Section 5 of the Act, **must be filed by the deceased employee's "legal representative,"** and, no such claim having been filed at all by the legal representative, the award of the Deputy Commissioner, Jessie Booker Armistead, etc., and the judgment of the District Court affirming it are void for want of jurisdiction.

Second. The Act itself creates the Federal jurisdiction as to Workmen's compensation. The right to **elect** as to whether suit shall be brought for compensation or for damages and the right to file the claim for compensation are solely vested by the statute in the **"legal representative" of the deceased employee. The question presented here is as to the jurisdiction.**

Montgomery's Manual of Federal Jurisdiction and Procedure, 3rd Ed., Page 73, Sec. 92, discussing U.S. C.A., Title 28, Sec. 80 (Jud. Code 37), relating as to whether a dispute or controversy **is properly within the jurisdiction of the Court,** at page 73, Sec. 92, citing numerous cases, says:

> . . . **"As to whether the case is within the scope of its jurisdiction, is a question which the court**

> is bound to examine and determine, although not presented by the parties,—and even where they consent to a determination of the controversy on its merits. 'Consent cannot confer jurisdiction, and want of jurisdiction cannot be waived.' The same obligation rests upon a reviewing court; and on every court; and on every writ of error or appeal, the preliminary inquiry is as to the jurisdiction (1) of the appellate court, and (2) of the court from which the record comes.. And, inasmuch as a federal court is a court of limited jurisdiction, the fact that the case is one of which the court may take cognizance must appear affirmatively from the record,—otherwise a reversal must be ordered.. "Unless the contrary affirmatively appears, a presumption will be indulged that a cause is not within the court's jurisdiction."

Third. The question here presented to the Court was squarely before the Supreme Court of the United States in the case of **Lizzie M. Troxell, Administratrix vs. Del., Lackawanna and Western R. Co.,** *227* U. S. 586, 57 L. Ed. 537, under the Federal Employers' Liability Act, containing a provision like the one here. The Court there, in its opinion, at 57 L. Ed. 591, cited the case of **Brown vs. Fletcher,** 210 U. S. 82, 52 L. Ed. 966; 28 Sup. Ct. Rep. 702, and **Ingersoll** vs. Coran, 211 U. S. 335, 53 L. Ed. 208, 29 Sup. Ct. Rep. 92, and said that the **Circuit Court of Appeals** in the Troxell case, supra, held that, "except in mere form, the actions were for the benefit of the same persons and, therefore, the parties were practically the same; and the omission to sue as administratrix was merely

technical and would have been curable by amendment."

The Supreme Court of the United States then said:

> "This conclusion was reached before this Court announced its decision in **American Railroad Company** vs. **Burch**, 225 U. S. 547, 56 Law Ed. 879, 32 Sup. St. Rep. 603. That action was brought under the Federal Employers' Liability Act by **the widow and son of the decedent**, and not **by the administrator.** The Lower Court held that the requirement of the Act that the suit should be brought in **case of death by the personal representative of the decedent did not prevent a suit in the name of the persons entitled to the benefit of the recovery.** In other words, the Court ruled, as did the Circuit Court of Appeals in this case, that where it was shown that the widow and child were the sole beneficiaries they might maintain the action with the appointment of a personal representative. **This Court denied the contention and held that Congress, doubtless for good reasons, had specifically provided that an act under the Employers' Liability Act could be brought only by the personal representative; and the judgment was reversed without prejudice to the rights of such personal representative."**

So it is in the instant case. Congress, doubtless for good reasons, specifically provided that an action or claim under the Longshoremen's and Harbor

Workers' Compensation Act can be brought only "by the personal representative" of the deceased employee to recover compensation under the Act.

In **Dennison vs. Payne**, 293 Fed. Rep. 333, Syl. 4 and at page 341, the Circuit Court of Appeals for the Second Circuit, said:

> "And the law is equally well settled that, if a court, officer or board has acted without authority in the premises, its decision is not merely voidable but void, and affords no protection to those claiming under it." * * *

At bottom of page 342, the Circuit Court of Appeals further said:

> "The Federal Employers' Liability Act gives the right of action in case of the death of one employed in Interstate Commerce 'to his or her personal representative,'" * * *

Id. page 343. The Court said:

> "In American Railroad Co. vs. Burch, 244 U. S. 547, 32 Sup. Ct. 603, 56 L. Ed. 879, the action was brought under the Federal Act by the widow and son of the decedent, they being the sole beneficiaries, and not by the administrator. The Supreme Court, however, held that the action could not be maintained, but could be brought only in the name of the personal representative, and reversed the judgment without prejudice to the personal representative."

The Court then cited the Troxell case supra, where the action was instituted under the law of Pennsylvania, but in a Federal Court, to recover for the alleged wrongful death of the decedent by the widow for the benefit of herself and children. **That action she lost.** Troxell's administratrix then instituted suit in the same Federal Court under the Federal Employers' Liability Act. The administratrix in that action recovered, and the Court sustained the judgment.

All the rights and liabilities of the employer and employee "in maritime judgments" are created and arise under and from the Longshoremen's and Harbor Workers' Act. The right of action created therein is given **only** to the "legal representative" of the deceased employee employed in maritime employment, whose death occurred upon navigable waters and "arose out of and in the course of his employment."

The legal representative by the statute is given an election to determine whether he will sue for compensation or for damages, and then to institute a claim for compensation or action for damages whichever he may elect.

No such right is conferred upon the widow and children of the deceased employee, or his other relatives. The claim must be filed and the proceedings instituted by the legal representative. **This is the mandatory provision of the statute.**. If no such action is brought by him, but a claim and proceedings are filed, as here, by the widow without lawful right or authority to do so, then the Deputy Commissioner has no jurisdiction to entertain such claim and his award and the judgment of the District Court ap-

proving the same are void. This is the plain meaning and common sense of the statute, and the District Court had no authority to infringe this provision of the statute.

This Act was construed in **Chapman, et al, v. Griffith-Consumers Co.** (1939), 107 Fed. (2d) 263. There the Court, at page 267, said:

> **"In this case the action was brought by the employers for themselves, the Insurance Company and the next of kin, under the theory that the Act created in them the right to maintain such action."**

The Court held that the Act did **not** create in them a cause of action or the right to make the "election" and file the claim or institute the proceedings to recover "compensation or damages," and that the cause of action was created by the statute and vested **solely** in the "legal representative."

Here the claim is not with respect to the property of the deceased. The claim is created by the statute and is for "compensation or damages" and "such claim" means a claim asserted by the party given the cause of action or the right to make the election and institute and prosecute the claim—not by a person who has no **lawful** right to do so.

Fourth. Moreover, the Deputy Commissioner, who is given jurisdiction to determine "administrative questions" under or within "the purview (and thus at the expense of the Government and the clogging of this court's dockets) of the Act, is not given the right to file a petition for writ of certiorari or to become a litigant and convert himself into a litigant

instead of an "administrative finding body." He has no power or authority under law to become the litigant. He has no interest in the litigation, and the Act does not confer authority upon him to file petition for writ of certiorari. Neither the claim for compensation or damages is for his benefit.

Jessie B. Armistead, the widow, who filed the claim for herself and infant children, was a party to the suit as were her children who were made parties by guardian ad litem: They never filed the petition for writ of certiorari to this Court, nor did the Deputy Commissioner apply for the petition for writ of certiorari in their names but in the name of the Solicitor General of the United States for and on behalf of the Deputy Commissioner.

We find no warrant or authority of law for such action on the Deputy Commissioner's part, and the petition for writ of certiorari should be dismissed.

In conclusion and for the foregoing reasons and to the end that the law may be observed and justice be done, it is urged that this Court should affirm the decision of the United States Circuit Court of Appeals and dismiss the petition for writ of certiorari.

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